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No. 86-1020

In the Supreme Court of the United States

OCTOBER TERM, 1986

TED G. GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner contends that the court of appeals, in affirming the dismissal of his complaint, failed properly to apply Fed. R. Civ. P. 15(c).

1. In October, 1982, petitioner filed a timely administrative claim with the Veterans Administration alleging that he had suffered injuries arising from medical malpractice in June, 1981, at Wadsworth Veterans Administration Hospital in West Los Angeles. On March 22, 1984, the Veterans Administration denied petitioner's claim (Pet. App. A2). From this date, petitioner had six months in which to file a judicial action under the Federal Tort Claims Act. See 28 U.S.C. 2401(b).

On September 19, 1984, three days before the six-month statute of limitations had run, petitioner filed a complaint for medical malpractice in which he named the Veterans

Administration as defendant (Pet. App. A2). The complaint was served on the Veterans Administration on October 26, 1984.[1] The complaint was also served on the United States Attorney and the Attorney General on December 19, 1984, and March 8, 1985, respectively (*id.* at A2-A3).

The Veterans Administration moved to dismiss on the ground that it was not a proper party. The Federal Tort Claims Act creates a remedy against the United States, but not against its agencies and subdivisions, for personal injury arising out of the negligence of its employees. See 28 U.S.C. 1346(b), 2679(a). The district court granted the motion on April 10, 1985 (Pet. App. A16).

On March 21, 1985, before his earlier complaint had been dismissed, petitioner filed another complaint that named the United States as defendant (Pet. App. A3). This complaint was based on the same facts underlying petitioner's first complaint. The United States moved to dismiss the complaint as untimely. On June 27, 1985, the district court granted the motion (*id.* at A13).

Petitioner timely appealed the district court's dismissal of his second complaint.[2] The court of appeals affirmed (Pet. App. A1-A4). The court observed that the statute of limitations is a condition of the government's waiver of sovereign immunity (*id.* at A4). Pursuant to 28 U.S.C. 2401(b), petitioner was required to file his complaint against the United States within six months after his administrative claim had been denied. He failed to do so. Rather, he waited until

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[1]By letter dated November 19, 1984, the Veterans Administration informed petitioner that, because the agency was not a proper party to the action, his attempt to serve the complaint was inappropriate and ineffective.

[2]Petitioner did not appeal the dismissal of his first complaint.

nearly twelve months had elapsed before he filed his complaint against the United States. Petitioner's failure to file a timely complaint, the court concluded, was fatal to his claim (*ibid.*).

The court noted that Rule 15(c) in some cases permits the addition of a new defendant by means of an amended complaint. In the instant case, however, petitioner failed even to comply with the requirements of Rule 15(c): "[Petitioner] never amended his complaint. He instituted a separate action" (Pet. App. A4). Moreover, stated the court, dismissal would have been appropriate even if petitioner had attempted to amend his complaint because the United States had no notice of the action within the six-month limitations period (*ibid.*).

2. The decision of the court of appeals is clearly correct and, indeed, is mandated by this Court's decision in *Schiavone* v. *Fortune, a/k/a/ Time, Inc.*, No. 84-1839 (June 18, 1986).

a. Petitioner contends (Pet. 17-20) that his second complaint should relate back to his first complaint because Rule 15(c) permits relation back so long as the proper party receives notice of the action within a reasonable time after the statute of limitations has run. This Court has expressly rejected that argument. In *Schiavone* (slip op. 9-11), this Court held that the plain language of Rule 15(c) requires that the proper party have notice of the claim "within the period provided by law for commencing the action:"

> We do not have before us a choice between a "liberal" approach toward Rule 15(c), on the one hand, and a "technical" interpretation of the Rule, on the other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language. We accept the Rule as meaning what it says.

> We are not inclined, either, to temper the plain meaning of the language by engrafting upon it an extension of the limitations period equal to the asserted reasonable time, inferred from Rule 4, for the service of a timely filed complaint. Rule 4 deals only with process. Rule 3 concerns the "commencement" of a civil action. Under Rule 15(c), the emphasis is upon "the period provided by law for commencing the action against" the defendant. An action is commenced by the filing of a complaint and, so far as [the defendant here] is concerned, no complaint against it was filed [within the statute of limitations].
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> The linchpin is notice, and notice within the limitations period. Of course, there is an element of arbitrariness here, but that is a characteristic of any limitations period. And it is an arbitrariness imposed by the legislature and not by the judicial process.

In the instant case, as in *Schiavone*, the defendant did not have notice of the filing of a complaint within the limitations period. The six-month limitations period expired on September 22, 1984. Petitioner waited until September 19, 1984, to file his suit, and he named an improper party, the Veterans Administration, as defendant. Even the Veterans Administration did not receive notice of the complaint until October 26, 1984.[3] Not until December 19, 1984, and March 8, 1985, did the United States Attorney and the Attorney General respectively receive notice of the complaint against

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[3]Because the Veterans Administration had no notice of the action until *after* the statute of limitations had run, this Court need not address petitioner's contention (Pet. 13-16) that timely notice to the agency should have been imputed to the United States. Cf. *Schiavone*, slip op. 11 n.8; *Williams* v. *United States*, 711 F.2d 893, 898 (9th Cir. 1983); *Hughes* v. *United States*, 701 F.2d 56, 58 (7th Cir. 1982).

the Veterans Administration. Not until March 21, 1985, did petitioner finally file a complaint that named the United States as defendant. In short, the United States did not have timely notice of petitioner's complaint. The court of appeals correctly held that this absence of notice was fatal to petitioner's "relation back" argument. See *Schiavone*, slip op. 9.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1987